(11)

No. 91-194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

QUILL CORPORATION,

Petitioner,

v.

STATE OF NORTH DAKOTA,
BY AND THROUGH ITS TAX COMMISSIONER,
HEIDI HEITKAMP,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of North Dakota

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BRIEF OF TAX EXECUTIVES INSTITUTE, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Pursuant to Rule 37 of the Rules of this Court, Tax Executives Institute, Inc. respectfully submits this brief as *amicus curiae* in support of Petitioner, Quill Corporation.[1] Tax Executives Institute (hereinafter "TEI" or "the Institute") is a voluntary, non-profit association of corporate and other business executives, managers, and administrators who are responsible for the tax affairs of their employers. The Institute was organized in 1944 and curently has approximately 4,600 members who represent more than 2,000 of the leading corporations in the

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[1] Tax Executives Institute has received the written consents of the Petitioner and Respondent to the filing of this brief; those consents have been filed with the Clerk of the Court.

United States and Canada. The members of the Institute represent a cross-section of the business community in North America; nearly all the companies represented by the Institute's membership are engaged in interstate commerce. Substantially all the Institute's members will be directly affected by the resolution of this case, for it implicates the Commerce Clause[2] rights not only of mail-order companies but of all interstate businesses.

Tax Executives Institute is dedicated to promoting the uniform and equitable enforcement of the tax laws throughout the Nation and to reducing the costs and burdens of administration and compliance to the benefit of both the Government and taxpayers. This case involves the continuing vitality of this Court's 1967 Commerce Clause decision in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967). In that case, the Court held that an interstate business without any physical presence or activities in a given State did not have a sufficient connection or nexus with the State to require the business to collect and remit use taxes on sales made by mail and telephone to customers within the State. By casting aside this Court's decision in *National Bellas Hess*, the North Dakota Supreme Court rejected a long established bright-line test that vindicated the Commerce Clause and simplified tax administration for thousands of business taxpayers and tax administrators.

The Institute is concerned that the breadth of the North Dakota Supreme Court's decision will frustrate the national policies underlying the Commerce Clause and deprive taxpayers of the certainty that *National Bellas Hess* brought to the administration of the Nation's sales and use tax laws and to state taxation generally. If the North Dakota Supreme Court's decision stands, taxpayers throughout the Nation will suffer from the resulting uncertainty and increase in the cost and burden of compliance. As the individuals who must con-

[2] U.S. Const. art. I, § 8, cl. 3.

tend daily with the interpretation and administration of the Nation's tax laws, the Institute's members have a vital interest in the proper disposition of this case.

SUMMARY OF ARGUMENT

The "fundamental purpose of the [Commerce] Clause is to assure that there be free trade among the several States." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 335 (1977). In tandem with the Due Process Clause of the Fourteenth Amendment[3], the Commerce Clause acts to prevent the States from enacting unfair tax or tax collection statutes and thereby imposing "unreasonable clog[s] upon the mobility of commerce." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935). *Amicus* Tax Executives Institute is concerned about the scope and the implications of the North Dakota Supreme Court's decision in this case. If not reversed, the decision would undercut the protections afforded taxpayers by the Commerce Clause, both because of the uncertainty it would spawn and because of the disproportionate costs it would impose.

The decision below has significance beyond the borders of North Dakota and far beyond the duty of a large mail-order business to collect use tax on out-of-state orders. It potentially affects the ability of all businesses—no matter how small and no matter where located—to engage in interstate commerce without the imposition of undue burdens. *Amicus* TEI is concerned about the possible expansion of the Supreme Court of North Dakota's spurious reasoning beyond the use tax area—specifically, to the ability of the States to tax income derived from interstate commerce where the only activities of the out-of-state person are the solicitation of orders, notwithstanding the existence of federal legislation limiting such taxation. *See* Pub. L. No. 86-272, 73 Stat. 555 (*codified at* 15 U.S.C. § 381 (1988)). That the North Dakota decision

[3] U.S. Const. amend. XIV, § 1.

implicates more than the States' ability to impose a use tax obligation on mail-order businesses is suggested by the Court's decision to hear the case in tandem with *William Wrigley, Jr. Co. v. Wisconsin Department of Revenue*, 465 N.W.2d 800 (Wis. 1991), *cert. granted*, 60 U.S.L.W. 3257 (U.S. Oct. 7, 1991) (No. 91-119), which involves an interpretation of the federal statute.

In addition, in reaching its decision, the North Dakota court ignored a basic principle of constitutional adjudication: It is this Court that prescribes constitutional standards and the lower courts are obliged to adhere to those standards. *Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867). The decision below thus stands not only as a repudiation of the bright-line test set forth in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), but also as an affront to this Court's undeniable and necessary authority to establish governing principles of constitutional jurisprudence and the Congress's rightful power to regulate commerce. *Amicus* TEI respectfully suggests that if *National Bellas Hess* and the quarter century of its judicial progeny are to be jettisoned—if the commercial relationships developed in reliance upon the decision are to be upended—it is for Congress to decide. *See Flood v. Kuhn*, 407 U.S. 258, 283-84 (1972).

"[O]nly Congress has both the ability to canvass the myriad facts and factors relevant to interstate taxation and the power to shape a nationwide system that [will] guarantee the States fair revenues and offer interstate businesses freedom from strangulation by multiple paperwork and tax burdens." *ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 331 (1982) (O'Connor, J., with Blackmun & Rehnquist, JJ., dissenting). Congress enacted such legislation in 1959 in respect of the States' ability to impose a net income tax. If the standard enunciated in *National Bellas Hess* is to be abandoned after 25 years, that decision should similarly be made by the national legislature.

The repudiation of the bright-line test established by *National Bellas Hess* would represent a major departure from long-standing principles of Commerce Clause jurisprudence and, if effected at all, should apply on a prospective-only basis. The retroactive application of any decision curtailing the protections afforded by *National Bellas Hess* would work a major hardship on interstate commerce and unjustly reward the States for their massive resistance to this Court's holdings. *Cf. Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971). First, retroactive application would deprive interstate taxpayers of the certainty necessary to conduct their business affairs in an orderly manner by signaling that the Constitution's protections (as articulated by this Court) may be only transitory. *American Trucking Ass'ns v. Smith*, 110 S. Ct. 2323, 2338 (1990) ("[w]hen the Court concludes that a law-changing decision should not be applied retroactively, its decision is usually based on its perception that such application would have a harsh and disruptive effect on those who relied on prior law"). The ensuing uncertainty would undermine the very purpose of the Commerce Clause.

Secondly, retroactively overruling *National Bellas Hess* would send a signal to the States that they have nothing to lose by disregarding this Court's holdings and "rolling the dice" with taxpayers' Commerce Clause rights. *Amicus* TEI believes the opposite signal should be sent: States should be placed on notice that they cannot blithely dismiss this Court's decisions. The decision of the North Dakota court should be reversed.

ARGUMENT

I.

In this case, the North Dakota Supreme Court held that this Court's holding in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), which limits the States' ability to impose a use tax collection obligation on out-of-state mail-order businesses, is an "obsolescent precedent" that is contrary to "common sense and experience." App. A10.[4] Averring that "[t]he economic, social, and commercial landscape upon which [*National*] *Bellas Hess* was premised no longer exists . . . ," App. A11, the North Dakota court cast aside this Court's holding that the Commerce Clause and Due Process Clause of the United States Constitution require the physical presence of a business in a State before that State can require the business to collect use tax on in-state mail-order sales. *See* U.S. Const. art. I, § 8, cl. 3; U.S. Const. amend. XIV, § 1. *Amicus* Tax Executives Institute believes that the decision of the North Dakota court is deeply flawed and threatens to impose unreasonable costs and burdens on interstate businesses in contravention of the Commerce Clause and Due Process Clause.

A. The Decisional Framework

The "fundamental purpose of the [Commerce] Clause is to assure that there be free trade among the several States." *Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 335 (1977). In tandem with the Due Process Clause of the Fourteenth Amendment, the Commerce Clause acts to prevent the states from enacting unfair tax or tax collection statutes and thereby imposing "unreasonable clog[s] upon the mobility of commerce." *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 527 (1935); *see* Paul J. Hartman, *Federal Limitations on State and Local Taxation* §§ 2.2, 2.3 (1981).

[4] References to "App." are to the appendix filed with Quill Corporation's Petition for a Writ of Certiorari to the Supreme Court of the State of North Dakota.

Because the Commerce Clause was intended to protect "the free flow of trade between the States," "[s]tate taxation falling on interstate commerce . . . can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." *Freeman v. Hewit*, 329 U.S. 249, 252, 253 (1946). In determining whether a particular state taxing scheme is constitutionally valid, this Court has held that "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros. v. Maryland*, 347 U.S. 340, 344-45 (1954). In *National Bellas Hess*, the Court cited *Miller Bros.* with approval and imported its "definite link, some minimum connection"—or nexus—standard into its Commerce Clause analysis. 386 U.S. at 756, *quoting Miller Bros.*, 347 U.S. at 344-45.

The overarching importance of nexus to Commerce Clause determinations is underscored by the Court's decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). In that case, the Court established a four-prong test for determining whether a state tax statute violates the Commerce Clause, holding that such a tax will be sustained only if—

- it is applied to an activity with a substantial nexus with the taxing State,
- it is fairly apportioned,
- it does not discriminate against interstate commerce, and
- it is fairly related to the services provided by the State.

Id. at 279. Thus, *Complete Auto Transit* sets forth a decisional framework for Commerce Clause inquiries that in-

corporates the Due Process nexus test as a threshold requirement and then requires a balancing of competing interests in determining whether the tax infringes on interstate commerce. *See, e.g., Trinova Corp. v. Michigan Dep't of Treasury*, 111 S. Ct. 818, 828-29 (1991); *Exxon Corp. v. Department of Revenue*, 447 U.S. 207, 227-28 (1980). Absent a sufficient connection between the State and the person, property, or transaction to be taxed, however, the "fairness" of the particular levy—whether it is properly apportioned or whether it is reasonably related to the services provided by the State—is irrelevant: it will be struck down as violative of both the Due Process Clause and the Commerce Clause. *See Trinova Corp.*, 111 S. Ct. at 828-29; *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 436-37 (1980).[5]

National Bellas Hess involved the State's power to impose a use tax collection duty on an out-of-state business with respect to sales made to in-state customers through a common carrier or the mails. Although *National Bellas Hess* predates the Court's decision in *Complete Auto Transit*, the earlier decision applied the same nexus standard that governs today: whether "some definite link, some minimum connection, [exists] between a state and the person, property or transaction it seeks to tax." *National Bellas Hess*, 386 U.S. at 756. *See Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 626 (1981) (citing *National Bellas Hess* in support of the statement that the "threshold test" under *Complete Auto Transit* is whether the interstate busines has a substantial nexus with the taxing state); *Goldberg v. Sweet*, 488 U.S. 252, 263 (1989).

In *National Bellas Hess*, this Court considered whether a State could require an out-of-state mail-order business

[5] Similarly, a taxing scheme may be struck down as violating the second, third, or fourth prong of the *Complete Auto Transit* test even if the scheme is premised on a constitutionally sufficient nexus between the State and the person, property, or transaction to be taxed. *See Trinova Corp.*, 111 S. Ct. at 828-29; *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 617 (1981).

to collect the use tax on mail-order sales made to state residents. In striking down the statute under both the Commerce and the Due Process Clauses, the Court focused on whether the business maintained a physical presence within the State:

> [T]he Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail.

386 U.S. at 758. The Court explained that sanctioning the imposition of a use tax collection duty on a business that maintained no physical presence in the state would give rise to "unjustifiable local entanglements" of interstate commerce. *Id.* at 760. The Court reasoned that the administrative and recordkeeping requirements that could arise in the absence of a physical presence test "could entangle National [Bellas Hess's] interstate business in a virtual welter of complicated obligations to local jurisdictions. . . ." *Id.* at 759-60.

B. The Danger of an Open-Ended Standard

In the quarter of a century since this Court decided *National Bellas Hess*, the decision has been cited in more than 75 cases, including 8 decisions by this Court. App. A76-A81. Notwithstanding the long history of adherence to the physical presence test enunciated in *National Bellas Hess*, the North Dakota Supreme Court blithely concluded:

> [T]he concept of nexus encompasses more than mere physical presence within the state, and . . . the determination of nexus should take into consideration all connections between the out-of-state seller and the state, all benefits and opportunities provided by the state, and should stress economic realities rather than artificial benchmarks.

App. A25-A26. The lower court then collapsed the first and fourth prongs of the *Complete Auto Transit* test,

choosing to focus on whether the tax collection duty at issue is "fairly related to the benefits, opportunities, or services provided by the taxing state." App. A27-A28. The court thus incorrectly transformed the independent requirements of substantial nexus (first prong)—a threshold requirement—and fair relation (fourth prong) into a single "balancing" standard that concentrates myopically on the business's "economic presence" in the State.

By short-circuiting its application of *Complete Auto Transit*, the North Dakota court deigned to paint its repudiation of the bright-line test in *National Bellas Hess* as a necessary step in overcoming "the fertile imaginations of attorneys representing mail order interests." App. A11. Such a transmogrification of this Court's precedents, however, is not without its costs. If the physical presence test prescribed in *National Bellas Hess* were supplanted by the North Dakota court's pliable "economic presence" standard, the Commerce Clause rights of interstate businesses would be seriously impaired for two reasons. First, the "economic presence" test is open-ended and without limits; it operates as a one-way street to rationalize taxing schemes, not to vindicate the Commerce Clause rights of interstate businesses. Secondly, the "economic presence" test would impose unreasonable administrative costs and burdens on interstate businesses.

1. *The Price of an Open-Ended "Standard."* The "economic presence" standard propounded by the North Dakota court offers taxpayers and tax administrators no certainty, for it turns on "a review of the totality of the circumstances, on a case-by-case basis, with special emphasis upon the economic realities presented." App. A23. In the absence of certainty, however, the Commerce Clause cannot operate to "ensure a national economy free from such unjustifiable local entanglements." *National Bellas Hess*, 386 U.S. at 760. Rather than serving as a brake on "unreasonable clog[s] on the mobility of commerce," *G.A.F. Seelig, Inc.*, 294 U.S. at 527, the nexus

requirement as interpreted by the States would become little more than the word "glory" in *Through the Looking Glass*: meaning whatever the States, like Humpty Dumpty, say it means.[6]

This unsettling portrait of the "economic presence" test is unfortunately confirmed by a review of the North Dakota court's opinion. The court offered no governing standard, no sense of balance; rather, it adopted the "kitchen sink" approach. In its quest to find "economic presence," the court seized upon a whole variety of undifferentiated "contacts" and "connections" between the Quill Corporation and the State:

- The number of customers the company had in the State, the amount of annual sales, and the number of catalogs and flyers mailed to customers in the state. App. A29.
- The presence of a "help line" for consumers to call (at their own expense) and specialized service representatives to assist with custom printing orders or to answer questions about computers available for sale. App. A29.
- The company's licensing to some of its North Dakota customers of a computer software program, which accorded those customers direct computer access (again at the customer's own expense) to Quill's computer system. The court noted that Quill retained rights to the software and related documentation through the license agreement. App. A29-30.[7]

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[6] Lewis Carroll, *Through the Looking Glass* 186 (Signet Classic 1960 ('"When *I* use a word ['glory']," Humpty Dumpty said, in a rather scornful tone, "it means just what I choose it to mean—neither more nor less."').

[7] The court also stated that "[b]ecause Quill retained ownership rights in its . . . software and accompanying user documentation, Quill received fire and police protection for its property within the State." App. A35.

The court did not seriously endeavor to evaluate the relative importance of these "contacts." Rather, it simply cited them as supporting, somehow, its finding of nexus. As to whether the use tax collection obligation was fairly related to the services provided by North Dakota,[8] the court embraced "an expanding view of the benefits which may support State taxation." App. A31. It argued that imposing use tax collection obligations on Quill and other mail-order businesses was proper because "it is the in-state infrastructure which creates and maintains the consumer market and economic climate that fosters demand for the seller's goods and services." App. A32. The court also noted that Quill had access to the state court system to enforce legal rights against delinquent or fraudulent buyers and was assured of an orderly market through consumer protection and usury laws on mail order transactions. App. A33. Similarly, the court stated that Quill's contacting North Dakota financial institutions to check credit information on customers was furthered by State regulation of the banking industry. App. A35.

Finally, the court invoked the notion of "trash nexus." It asserted that the Commerce Clause provided no protection to Quill because "[the State] disposes of the 24 tons of solid waste contributed annually to North Dakota landfills by Quill's catalogs and flyers." App. A34. The court noted that the Connecticut Supreme Court had rejected such a concept in *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn.), *cert. denied*, 59 U.S.L.W. 3838 (U.S. 1991), but superciliously characterized the Connecticut court's analysis as "far too simplistic." App. A34.[9]

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[8] As previously stated (*supra* at pages 9-10), the North Dakota court erroneously combined its analysis of the first and fourth prongs of the *Complete Auto Transit* test, jumping to the fourth (fair relation) prong before establishing whether the threshold requirement of substantial nexus had been satisfied.

[9] The Connecticut court had dismissed the trash nexus argument as "without merit," reasoning that "[b]ecause the catalogs are the property of the Connecticut residents, it is axiomatic that it is the resident who is deriving the benefit from the state and who must contribute to the cost of the disposal." *SFA Folio Collections, Inc.*, 585 A.2d at 671 n.6.

As previously suggested, there was no order to the North Dakota court's analysis of the various factors claimed to support its finding of "economic presence." There was no weighing of the factors, no indication that the omission of one or two factors would have defeated the finding of nexus or that the addition of another, unstated factor would have cemented it.

That is the problem with the North Dakota court's "economic presence" standard: it is so amorphous that no matter what a business's "defense" might be to the citation of a particular factor, the State would be free to conjure up another. For example, could the mere licensing of software to residents of a State, without more, subject an out-of-state business to a use tax collection obligation? [10] Could the cashing of a check drawn on an in-state bank, without more, somehow satisfy the Commerce Clause's requirement of "substantial nexus" between a State and an out-of-state business? Would the answer be any different if the out-of-state business engaged in direct solicitation of in-state customers? Or if it engaged in business only through advertisements in general circulation periodicals? Or if its television or radio advertising originated outside the State?

Presumably, the State would respond that none of the aforementioned factors by itself would be enough. Undoubtedly, the North Dakota court would point to the State's statutory definitions of "retailer" and "maintaining a place of business." North Dakota Cent. Code

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[10] The software license in this case is substantially similar to licenses granted in respect of all commercially available software programs; its primary purpose is to restrict the uncompensated duplication of the software, not to preserve the licensor's rights in any tangible property (floppy diskettes and program documentation).

§§ 57-40.2-01(6), (7) (Supp. 1989), *reprinted at* App. A47-A48. The question, however, is not whether the States choose to tax such activity but whether the Constitution permits such a tax. A negative answer to the latter question does not flow inevitably from the North Dakota court's analysis. Indeed, *amicus* TEI submits that as crafted by the North Dakota court, the "economic presence" test is more insidious than the "slightest presence" test that this Court properly rejected in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 556 (1977). After all, in *National Geographic* the business had some physical presence in the state, albeit unconnected with the transactions giving rise to the use tax obligation. *See* Jerome J. Hellerstein, *State Taxation I: Corporate Income and Franchise Taxes* ¶ 6.7[2], at 226-27 (1983). Here, there is nothing but "conjured presence" and trumped-up nexus.

Stated simply, abandoning the bright-line test of *National Bellas Hess* could leave the States free to wield "economic presence" as a shibboleth to eviscerate the protections of the Commerce Clause's nexus requirement. The scope and meaning of the term would change from case to case, to suit the needs and wants of the taxing jurisdiction. It would provide no guidance to taxpayers or tax administrators and would guarantee, not the free flow of commerce, but only contention and dispute. Under the North Dakota court's view of the Commerce Clause, the vindication of interstate commerce would depend on self-restraint by the States. There would be no stability in the rules. There would be no predictability. And the basic purposes of the Commerce Clause and Due Process Clause would consequently be undermined.

2. *The Administrative Burdens Spawned by an Open-Ended "Standard."* In *National Bellas Hess*, this Court cited with concern the administrative cost and burdens that would be imposed on mail-order businesses absent a Commerce Clause and Due Process requirement that a

business be physically present in the State seeking to impose a use tax collection obligation. 386 U.S. at 759-60. Noting that "if Illinois can impose such burdens, so can every other State, and so, indeed, can . . . every other political subdivision throughout the Nation with the power to impose sales and use taxes," the Court concluded that "[t]he very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglements." *Id.*

The North Dakota court gave short shrift to this Court's well-articulated concerns about the administrative burdens spawned by a wide-open nexus standard, as follows: "The almost universal usage of automated accounting systems, and corresponding advancements in computer technology, have greatly alleviated the administrative burdens created by such a collection duty." App. A26. The court also suggested that any burden on the seller is "alleviate[d]" by the State's permitting the seller to retain a percentage of the use tax as reimbursement for expenses incurred in collecting and remitting the tax. App. A26.

Notwithstanding the North Dakota court's effort to trivialize this Court's concern with the administrative burdens spawned by the imposition of use tax collection obligations, there can be no doubt such burdens can, and do, rise to the level of constitutional significance. Lawrence H. Tribe, *American Constitutional Law* 450 (2d ed. 1988). These burdens are not imaginary or remote: they are real and profuse. When *National Bellas Hess* was decided, there were 2,300 local jurisdictions that could potentially impose obligations on out-of-state businesses. 386 U.S. at 759 n.12. That number now stands at more than 7,000 with a variety of thresholds, rates, exemptions, and varying definitions of the same operative terms. Price Waterhouse, *Study to Estimate the Cost of Collecting State & Local Sales and Use Tax* ES-2 (1990); *see* Advisory Commission on Intergovernmental Relations,

State and Local Taxation of Out-of-State Mail Order Sales 6 (April 1986).[11]

Were that it were true that compliance could be effected by the flip of a computer switch! But it is not true. Hence, the North Dakota court can employ pejorative terms—such as "goliath" (App. A11) and "leviathan" (App. A24)—to describe Quill Corporation, but it cannot evade the reality that most mail-order businesses are not behemoths but small businesses.[12] Does the Constitution distinguish between a business with computer facilities and those without?

Moreover, even if modern technology makes it *possible* to comply with a plethora of state use tax collection obligations, it does not make it *free*. Businesses would have to purchase the necessary computer software, hire personnel to ensure its maintenance, devote catalog space to explaining the obligations to its customers, and establish procedures for handling customer errors (especially where the customer pays by check). Note, *Collecting the Use Tax on Mail-Order Sales*, 79 Geo. L.J. 535, 539-41 (1991)

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[11] The Advisory Commission, which gave a 1986 total of 6,500 jurisdictions, wrote that "[i]n addition to rate differences, exempt items and buyers vary greatly from state to state—a particular problem for sales into states exempting purchase of food or clothing, or to potentially exempt buyers (e.g., charitable organizations in many states [and governmental units]), or to business firms." *Id.* at 6.

[12] Daniel T. White, *Emerging State Use Tax Collection Legislation and the Out-of-State Mail Order Vendor: One Unconstitutional Step Beyond* Scripto *and* National Bellas Hess, 42 Fla. L. Rev. 775, 801 (1990) ("Sound policy reasons support the Court's view that economic presence alone does not create the required nexus. Standards using communicative and incidental contacts do not achieve any marked degree of certainty, one goal of due process. With respect to the commerce clause, compliance with over 6,500 taxing jurisdictions is simply too burdensome for the majority of the mail order industry's members: small mail order vendors.").

(detailed discussion of administrative burdens posed by use tax collection obligation); Laura A. Kulwicki, *State Taxation of Mail Order Sellers: An End to the Nexus Wars?*, 1 State Tax Notes 332, 337-38 (1991) (the North Dakota court "seriously misgauged the nature of the use tax collection obligation and the ability of computers to ease the resulting burdens in collection"). Although the burdens could be tempered if the States and local jurisdictions could agree on a single set of definitions, exemptions, and rates, there is absolutely nothing to suggest any such agreement will be soon forthcoming.

According to a survey conducted by an independent accounting firm, the average mail-order business spends 15 cents for every dollar of use tax collected, with expenses ranging from 25.1 percent of the collected tax (for firms with gross sales of less than $10 million) to 2.4 percent (for firms with gross sales of more than $100 million). Touche Ross, *A Study to Determine the Economic Impact on Mail Order Firms of Multi-State Sales Tax Collection* 5 (1986), *cited in* Note, *supra*, 79 Geo. L.J. at 540 n.36. The 15-percent average cost found in the study is 10 times higher than the credit North Dakota affords as reimbursement for expenses incurred in collecting and remitting the use tax. *See* North Dakota Cent. Code § 57-40.2-07.1 (Supp. 1989), *reprinted at* App. A51. Contrary to the North Dakota court's assertion, such a modest offset scarcely "alleviates" the business's cost. In addition, that cost is more than five times greater than the cost imposed on in-state retailers. *See* Price Waterhouse, *supra*, at III-3 (national average collection cost of 3.48 percent of total sales tax liability).[13]

In summary, this Court's concern about the administrative cost and burdens associated with imposing a use tax collection obligation on out-of-state businesses was valid

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[13] *Accord* Note, *supra*, 79 Geo. L.J. at 541 ("[o]n average mail-order companies bear six or seven times the collection costs of in-state retailers who can collect sales tax at the cash register").

in 1967, and it remains valid today. The "virtual welter of complicated obligations to local jurisdictions," 386 U.S. at 760, has not abated but, rather, has intensified. It remains a matter of constitutional significance and cannot be ignored.

II.

The North Dakota court's decision has significance beyond the borders of North Dakota and far beyond the duty of a large mail-order business to collect use tax on out-of-state orders. The expansive nexus standard propounded by the North Dakota court threatens the ability of all businesses—no matter how small and no matter where located—to engage in interstate commerce.

The danger posed to interstate commerce by the North Dakota decision is similar to the threat posed by the taxing standard advocated by the State of Wisconsin and other States in the state income tax case being heard in tandem with this one, *William Wrigley, Jr. Co. v. Wisconsin Department of Revenue*, 465 N.W.2d 800 (Wis. 1991), *cert. granted*, 60 U.S.L.W. 3257 (U.S. Oct. 7, 1991) (No. 91-119). *Amicus* TEI is concerned about the possible expansion of North Dakota's flawed analysis beyond the use tax area—specifically, to the ability of the States to tax income derived from interstate commerce.

Currently, federal legislation prohibits the States from imposing taxes on or measured by net income derived within the State from interstate commerce if the "only business activities within such State by or on behalf of such person" are solicitations of orders for sales of tangible personal property, where the orders are sent outside the State for approval or rejection and are filled by shipment or delivery from a point outside the State. *See* Pub. L. No. 86-272, 73 Stat. 555 (*codified at* 15 U.S.C. § 381 (1988)). The legislation, however, does not extend to sales of services or intangible property, and accordingly, restrictions on the States' ability to impose income taxes in respect of financial institutions and service industries

(among others)—and their ability to impose other types of taxes—continue to be governed by this Court's interpretation of the Commerce Clause. That the North Dakota decision implicates more than the States' ability to impose a use tax obligation on mail-order businesses is suggested by the Court's decision to hear the case in tandem with *William Wrigley, Jr. Co.*, which involves an interpretation of the federal statute.

Public Law No. 86-272, which was enacted in 1959, prohibits a state from taxing income derived from interstate commerce if the only activities of the out-of-state person within the state are "the solicitation of orders." *See William Wrigley, Jr. Co.*, 465 N.W.2d at 807.[14] In determining whether the taxpayer's activities fell within the ambit of Public Law No. 86-272, the Wisconsin Supreme Court held that solicitation "includes activities incidental to the initial contact between buyer and seller" even when "th[e] orders may be future orders." *Id.* at 809, 811. The Wisconsin court's holding that certain incidental or *de minimis* activities did not place the taxpayer beyond the protection of the federal statute is consistent with decisions reached by, among others, courts in New York Pennsylvania, and Indiana. *See Gillette Co. v. State Tax Comm'n*, 393 N.Y.S.2d 186, 191 (1977), *aff'd*, 382 N.E.2d 764 (1978); *United States Tobacco Co. v. Commonwealth*, 386 A.2d 471, 478 (Pa.), *cert. denied*, 439 U.S. 880 (1978); *Indiana Dep't of Revenue v. Kimberly-Clark Corp.*, 416 N.E.2d 1264, 1268 (Ind. 1981).

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[14] The rationale for the law limiting the States' ability to tax income from sales of tangible personal property has been explained in terms similar to those used in *National Bellas Hess*: "[T]he uncertainty of interstate tax liability and inevitable new reporting, accounting and tax costs presented a real threat which was inducing retreat of business from the free markets and the deprivation of consumer goods and services to the detriment of the American economy." *International Shoe Co. v. Cochreham*, 164 So. 2d 314, 321 (La.), *cert. denied*, 379 U.S. 902 (1964).

The authorities cited by the Wisconsin Supreme Court clearly and logically hold that its interpretation of the term "solicitation" is necessary to fulfill the purpose of Public Law No. 86-272. *William Wrigley, Jr. Co.*, 465 N.W.2d at 811-12. Thus, in *United States Tobacco Co. v. Commonwealth*, the Pennsylvania Supreme Court held that—

> making evanescent distinctions between "solicitation" and "solicitation plus" or "merchandising," when the activities in question were all incident to soliciting business, would defeat the very purpose of . . . [Public Law No. 86-272]. Solicitation cannot mean that a foreign corporation may do no more than send salespeople into another state who leave brochures describing their employer's products, hoping the prospective customer will then take the initiative to contact the employer for a possible sale.

386 A.2d at 478, *cited at William Wrigley, Jr. Co.*, 465 N.W.2d at 809-10. *See also Gillette Co.*, 393 N.Y.S.2d at 191 (restrictive construction of "solicitation" is "untenable" and, "if indulged in by the several states, [would] tend to 'Balkanize the American economy' "), *cited at William Wrigley, Jr. Co.*, 465 N.W.2d at 812.

The Wisconsin Department of Revenue, in contrast, has propounded an over-restrictive construction of Public Law No. 86-272 that would put even the replacement of stale or damaged merchandise by a sales representative beyond the pale. Petition for a Writ of Certiorari, *Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co.* (No. 91-119). Experience teaches, however, that any sales representative who refuses to return such goods to the plant runs a very real risk of losing a customer. In other words, by adopting an absolutist approach to what constitutes "solicitation," the Wisconsin Department of Revenue would effectively render the federal statute a nullity and frustrate interstate commerce.[15]

[15] It would also confront interstate businesses with enormous compliance burdens, increasing dramatically the number of state income tax returns such businesses would be required to file. These burdens would be singularly non-productive. Wisconsin would tax a piece of Wrigley's income that, pursuant to Illinois's apportionment formula, is already being taxed. If successful in *Wrigley*, Wisconsin would presumably claim a comparable piece of every interstate business's income. If the other States follow suit (and employ similar apportionment formulae), the result could well be, not an increase in those businesses' aggregate income tax liability, but simply a time-consuming and inefficient shifting of income from one jurisdiction to another.

The relevance of the *Wrigley* case to *Quill* is this: it underscores that, for the States, the coin of the realm is not principle, but the end result—a finding of nexus. Thus, in tandem with their argument that *National Bellas Hess*'s bright-line standard should be consigned to history in favor of an amorphous "balancing" test that will conscript interstate businesses to be their collection agents,[16] the States seek refuge in an unreasonably strict interpretation of Public Law No. 86-272 on the grounds that there is a need for "clarity" and "certainty." *See* Petition for a Writ of Certiorari, at 17, 19-20, *Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co.* (No. 91-119). Indeed, the test the Wisconsin Department of Revenue champions (and which other States endorse[17])

[16] "Anti-*Bellas Hess*" legislation, which seeks to make advertising by catalog or otherwise a sufficient nexus for sales and use tax purposes, has been enacted by 36 States: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Kentucky, Louisiana, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and West Virginia. *See* Laura A. Kulwicki, *State Taxation of Mail Order Sellers: An End to the Nexus Wars?*, 1 State Tax Notes 332, 332 n.1 and 341-42 (1991) (chart of sales and use tax statutes specifically applicable to mail-order sales).

[17] For example, 33 States joined a brief *amicus curiae* supporting this Court's review of the *Wrigley* case. *See* Brief of Amici Curiae in Support of Petition for Writ of Certiorari by the State of Iowa and the States of Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri,

would establish an undeniable bright line: it would empower the States to ignore Public Law No. 86-272 in its entirety, thereby thwarting Congress's authority under the Commerce Clause to regulate interstate commerce.

In other words, the same States that decry a bright-line test on the use tax side of the ledger, cling desperately to an all-or-nothing interpretation of Public Law No. 86-272. *Amicus* TEI submits that the States' position in this case and *Wrigley* to do "whatever it takes to tax" should not be lost on the Court in either case.

III.

In renouncing this Court's decision in *National Bellas Hess*, the North Dakota court ignored a basic principle of constitutional adjudication: It is this Court that prescribes constitutional standards and the lower courts are obliged to adhere to those standards "no matter how misguided the judges of those courts may think [them] to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982); *accord Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 253 (1867) (if the lower courts did not adhere to Supreme Court precedent, there would be "mischievous consequences").

As previously noted, 36 States have enacted legislation essentially in defiance of this Court's holding in *National Bellas Hess*.[18] While some of these statutes implicitly recognize that they are at odds with governing law and, hence, are contingent on intervening federal legislation or other federal authority, others fly straight in the face of this Court's precedents. Alabama, for example, perniciously deems the U.S. Postal Service to be the seller's

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Montana, Nebraska, New Mexico, New York, North Carolina, Ohio, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Virginia, and West Virginia, *Wisconsin Dep't of Revenue v. William Wrigley, Jr. Co.* (No. 91-119).

[18] *See* Kulwicki, *supra*, 1 State Tax Notes at 332 & n.1.

agent, even though *National Bellas Hess* clearly states that the use of common carriers or the mails will not provide sufficient nexus for Commerce Clause and Due Process purposes. 386 U.S. at 758; *see* Alabama Code § 40-23-1(a)(5) (Supp. 1990).

More dramatically, the Governor of North Dakota has himself declared that "[we] are taking the matter into our own hands." Carol Douglas, *State Officials Determined to Tax Interstate Mail-Order Sales*, 47 Tax Notes 1048 (1990) (quoting the Honorable George A. Sinner). Such massive resistance—regarding either the imposition of a direct tax or a use tax collection duty—cannot be tolerated. The defiant cries of the States—"taxation now, taxation tomorrow, taxation forever"—must not go unchallenged. If these actions by the States, untethered by principle, are not beyond the pale of the Commerce Clause, then just exactly what protection does the Clause provide?

The North Dakota court sought to justify its repudiation of *National Bellas Hess* by continual references to the "tremendous social, economic, commercial, and legal innovations" since the decision was rendered in 1967. App. A10; *see* App. A11 ("[t]he economic, social, and commercial landscape upon which [*National*] *Bellas Hess* was premised no longer exists"); App. A13 ("changes in marketing techniques have affected the economic and commercial landscape"); App. A21 ("wholesale changes in the social, economic, commercial, and legal arenas"). The degree of change is undeniable. It does not necessarily follow, however, that change itself empowers the States to disregard this Court's precedents.

Indeed, the Court's approach to the Commerce Clause—in *National Bellas Hess* and subsequent cases—should properly be viewed as having played a role in the growth and development of the mail-order industry. *Amicus* TEI submits that the Court should be loath to interfere with the clear pattern of commercial development that *National Bellas Hess* has fostered in the 25 years it has been

outstanding. This is especially the case since Congress has had countless opportunities to modify or overrule the Court, but has heretofore declined to exercise its primary jurisdiction under the Commerce Clause. *See* Hellerstein, *supra*, ¶ 6.17 (discussion of the congressional "stalemate" since the enactment of Public L. No. 86-272); Note, *supra*, 79 Geo. L.J. at 558-61 (discussion of recently proposed federal legislation).

In *Flood v. Kuhn*, 407 U.S. 258 (1972), Justice Blackmun expressed the Court's well-founded unwillingness to interfere with commercial relationships that had developed in reliance upon a decision of this Court. "If there is any inconsistency or illogic in all this," he wrote for the Court, "it is an inconsistency and illogic long standing that is to be remedied by Congress and not by this Court." *Id.* at 284. The reluctance voiced in *Flood v. Kuhn* should similarly manifest itself here. A quarter of a century of experience has reinforced the institutionalization of *National Bellas Hess*'s nexus rule and the judicial modification of the rule at this point would cause unwarranted commercial disruption.

Thus, *amicus* TEI respectfully suggests that if *National Bellas Hess* is to be repudiated—if the commercial relationships developed in reliance upon the decision are to be upended—it is for Congress to decide. "[O]nly Congress has both the ability to canvass the myriad facts and factors relevant to interstate taxation and the power to shape a nationwide system that [will] guarantee the States fair revenues and offer interstate businesses freedom from strangulation by multiple paperwork and tax burdens." *ASARCO, Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 331 (1982) (O'Connor, J., with Blackmun & Rehnquist, J.J., dissenting).[19]

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[19] *See Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 280 (1978), in which the Court stated: "It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States

Justice Frankfurter explained the quandary confronting the Court in his dissenting opinion in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959):

> At best, this Court can only act negatively . . . . We cannot make a detailed inquiry into the incidence of economic burdens in order to determine the extent to which such burdens conflict with the necessities of national economic life. Neither can we devise appropriate standards for dividing up national revenue on the basis of more or less abstract principles of constitutional law, which cannot be responsive to the subtleties of the interrelated economies of Nation and State.
>
> The problem calls for solution by devising a congressional policy. Congress alone can provide for a full and thorough canvassing of the multitudinous and intricate factors which compose the problem of the taxing freedom of the States and the needed limits on such state taxing power.

Id. at 476 (Frankfurter, J., dissenting); *see* Leonard E. Kust, *State Taxation of Interstate Income: New Dimensions of an Old Problem*, 12 Tax Executive 45, 54 (1959).

Significantly, Congress exercised its legislative authority in the aftermath of the Court's decision in *Northwestern States Portland Cement Co.*, enacting Public Law No. 86-272 (discussed in part II, *supra*). *Amicus* TEI submits that if, after 25 years, the standard enunciated in *National Bellas Hess* is to be modified, that decision belongs to the national legislature. *Amicus* TEI also submits that Congress's failure to enact such legislation—notwithstanding repeated attempts—should only strengthen the Court's resolve against judicially overturning long-established and relied-upon precedent.

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to adhere to uniform rules for the division of income. It is to that body, and not this Court, that the Constitution has committed such policy decisions."

IV.

For a quarter of a century, interstate businesses have relied on *National Bellas Hess* in structuring their business affairs. The repudiation of the decision's bright-line test would represent a major departure from long-standing principles of Commerce Clause jurisprudence and, if effected at all, should be applied on a prospective-only basis. Indeed, the retroactive application of any decision curtailing the protections afforded by *National Bellas Hess* would work a major hardship on interstate commerce and unjustly reward the States for repudiating this Court's holdings. *Cf. Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971).

The retroactive abrogation of that decision's physical presence test would do more than wreak havoc among the interstate businesses that relied on the decision: it would also send an ominous signal to all taxpayers concerning their ability to rely on established rules. Interstate taxpayers would be deprived of the certainty necessary to conduct their business affairs in an orderly manner because they would have to assume that the Court's pronouncements may be only transitory. The ensuing uncertainty would undermine the very purpose of the Commerce Clause.

As to the businesses that have acted in reliance on *National Bellas Hess*, the retroactive modification of the Court's interpretation of the Commerce Clause to their detriment would be especially unfair. At issue in this case, of course, is not a seller's primary tax obligation, but rather an obligation to collect and remit taxes owing by others—the seller's customers. If interstate businesses declined to collect such use taxes in reliance on *National Bellas Hess* and that decision were overturned, they would likely be saddled with the liability themselves since the customers may be nowhere to be found. Retroactive imposition of such a burden on a third-party collection agent would be inimical to basic concepts of fair play. In

American Trucking Ass'ns v. Smith, 110 S. Ct. 2323, 2338 (1990), Justice O'Connor explained that "[w]hen the Court concludes that a law-changing decision should not be applied retroactively, its decision is usually based on its perception that such application would have a harsh and disruptive effect on those who relied on prior law." [20] Such a harsh and disruptive effect would undeniably be visited upon businesses that relied on *National Bellas Hess*.

Clearly, the standards enunciated in *Chevron Oil* for prospective-only treatment are present here: a decision overturning or constricting *National Bellas Hess* would establish "a new principle of law" that was not clearly foreseen; the non-retroactive application of the decision would not retard the operation of the rule (which would simply permit the States to impose use tax collection obligations on out-of-state businesses); and the non-retroactive application of the decision would be necessary to avoid injustice and hardship to the out-of-state businesses that relied in good faith on *National Bellas Hess*. *See Chevron Oil Co.*, 404 U.S. at 106-07 (*citing Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969)); *see* Albin C. Koch, Beam *Resolves Taxpayer Claims under* Davis *but* Quill *Raises New Prospectivity Issue*, 43 Tax Executive 321, 324-25 (1991) (the equities favoring prospective-only application of any decision overturning *National Bellas Hess* "appear to be significant").

Moreover, in the analogous area of an employer's responsibility to collect Social Security and withholding taxes from its employees, this Court has clearly held that the obligation to act as a third-party collecting agent must be unequivocal. Specifically, in *Central Illinois Pub-*

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[20] *See id.* at 2342 (the purpose of prospectivity is "cushioning the sometimes inequitable and disruptive effects of law-changing decisions"); *United States v. Estate of Donnelly*, 397 U.S. 286, 295 (1970) (Harlan, J., concurring) (doctrine of *stare decisis* is intended to "avoid jolting the expectations of parties to a transaction").

lic Service Co. v. United States, 435 U.S. 21 (1978), the Court said that "[b]ecause the employer is in a secondary position as to liability for any tax of the employee, it is a matter of obvious concern that . . . the employer's obligation to withhold be precise and not speculative." *Id.* at 31; *see id.* at 38 (Powell, J., with Burger, C.J., concurring) (fundamental fairness should prompt the Government to refrain from the retroactive assessment of a tax absent notice sufficiently explicit to inform a reasonably prudent person of the legal consequences of failure to comply with a law or regulation). Under the standard set forth in *Central Illinois*, interstate businesses that relied on this Court's decision in *National Bellas Hess* should not be subject to any use tax obligation prior to the time that decision is overturned.

Amicus TEI is also concerned that the retroactive application of any decision curtailing the protections afforded by the Commerce Clause and *National Bellas Hess* would unduly reward the States for their massive resistance to this Court's holding. The retroactive overruling of *National Bellas Hess* would send a signal to the States that they have nothing to lose by disregarding this Court's holdings and "rolling the dice" with taxpayers' Commerce Clause rights. It thus would sanction the flip side of, and the mirror image of the cynicism underlying, the States' refusal to refund taxes held to be unconstitutional *ab initio* by this Court. *See* Koch, *supra*, 43 Tax Executive at 321-22 (discussion of *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991); *Davis v. Michigan Dep't of Treasury*, 109 S. Ct. 1500 (1989); *McKesson Corp. v. Division of Alcoholic Beverages & Tobacco of Florida*, 110 S. Ct. 2238 (1990); and *American Trucking Ass'ns, supra*).[21]

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[21] The most recent instance of the States' refusal to give force to this Court's pronouncements is Virginia's cursory treatment of *James B. Beam Distilling Co., supra*, to the question of the retroactivity of the Court's decision in *Davis*. *See Harper v. Virginia Dep't of Revenue*, No. 900770 (Va. filed Nov. 8, 1991) (holding that "nothing articulated in *Beam* requires a result different" from the Virginia court's refusal to apply *Davis* on a retroactive basis).

Amicus TEI believes the opposite signal should be sent: States should be placed on notice that they cannot disregard this Court's decisions with impunity and that they will not be permitted to reap the benefits of their defiance. Thus, any decision restricting the protections afforded by the Commerce Clause should be applied on a wholly prospective basis.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of the State of North Dakota should be reversed.

Respectfully submitted,

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